

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 4:10-CV- 439**

FLAHERTY & COLLINS
CONSTRUCTION, INC.,

Plaintiff,

vs.

MID-CONTINENT CASUALTY
COMPANY,

Defendant.

COMPLAINT

NOW COMES Plaintiff, Flaherty & Collins Construction, Inc., by and through its undersigned counsel, complaining of the Defendant Mid-Continent Casualty Company, and alleges and says as follows:

JURISDICTION AND VENUE

1. This Action is of a wholly civil nature over which the United States District Court for the Eastern District of North Carolina has original jurisdiction under 28 U.S.C. 1332(a).
2. Venue is proper under 28 U.S.C. 1391(a)(2).

THE PARTIES

3. Plaintiff Flaherty & Collins Construction, Inc. (hereinafter “Flaherty & Collins”) is an Indiana corporation authorized to do business and doing business as a construction contractor within the State of North Carolina.
4. Upon information and belief, Defendant Mid-Continent Casualty Company (hereinafter “Mid-Continent”) is an Ohio corporation authorized to do business and doing business within the State of North Carolina as an insurance provider.

STATEMENT OF FACTS

5. Plaintiff entered into a contract with Woodfield Investments, Inc. (hereinafter “Woodfield”) to construct a nine-building apartment complex and clubhouse located on property Woodfield owned in Raleigh, Wake County, North Carolina (hereinafter the “Project”).

6. Plaintiff entered into a subcontract agreement with Tulsa Tie-Scaping, Inc. (hereinafter “Tulsa”) to perform certain work for the Project.

7. The subcontract agreement between Plaintiff and Tulsa required, among other things, that Tulsa obtain and maintain throughout the term of the Project’s construction period, commercial and general liability insurance coverage for the Project.

8. Upon information and belief, Tulsa obtained the required insurance policy(s) from the Defendant Mid-Continent.

9. On or about the 9th day of August, 2007, employees of Tulsa, while engaged in digging a drainage trench, undermined a masonry wall at the Project causing a substantial portion of the wall to collapse damaging the Project, property of the Plaintiff and property adjacent to the Project owned by a private school.

10. Defendant Mid-Continent was timely notified by both Tulsa and Plaintiff of the wall collapse at the Project and the resulting property damage to the Plaintiff, the Project Owner and the adjacent property.

11. Upon information and belief, Defendant Mid-Continent refused to provide coverage or defense to its insured Tulsa for claims arising from the collapse of the masonry wall at the Project.

12. After months of delay, Defendant Mid-Continent finally informed Plaintiff that it would not provide coverage for Plaintiff’s losses based upon the allegation that Plaintiff was not

named as an additional insured on Tulsa's policy(s), but did not address Plaintiff's third-party claim under the relevant policy(s) of insurance.

13. Tulsa failed and refused to pay all costs and expenses resulting from the repairs to the damaged property at the Project and property adjacent to the Project.

14. Plaintiff was required for reasons of public safety and the protection of property, among other things, to make repairs at its own expense to the masonry wall at the Project and adjacent property.

15. Plaintiff Flaherty & Collins instituted an action in the Superior Courts of North Carolina against Tulsa and other parties seeking monetary damages arising from the negligence of Tulsa, and this case was removed, as a matter of right, to the United States District Court for the Eastern District of North Carolina (Civil Action No. 4:09-CV-00081).

16. Tulsa failed to plead or appear as provided by the Federal Rules of Civil Procedure, and upon proper motion, Tulsa's Default was entered on the 4th day of August, 2009.

17. After service of an Amended Complaint upon Tulsa, and again upon the failure of Tulsa to plead or otherwise respond to Plaintiff's Amended Complaint, Default was again entered by the Clerk of Court against Tulsa on the 4th day of February, 2010.

18. Plaintiff Flaherty & Collins filed a Motion for Default Judgment against Tulsa on the 23rd day of August, 2010.

19. By an Order dated the 2nd day of September, 2010, the Court entered a Default Judgment against Tulsa in the sum of Four Hundred Thirty-Seven Thousand Four Hundred Forty-Eight and 75/100 Dollars (\$437,448.75), together with interest and cost as allowable at law.

CAUSE OF ACTION

20. Plaintiff Flaherty & Collins is an intended third-party beneficiary of the policy(s) of insurance issued by Defendant Mid-Continent to Tulsa for the Project.

21. Defendant Mid-Continent's insured, Tulsa, has been adjudicated at fault for the monetary losses of the Plaintiff.

22. Plaintiff has performed, and upon information and belief Tulsa has performed, all of its obligations under the policy(s) of insurance, and all conditions precedent have otherwise been met for Plaintiff to obtain indemnification under the policy(s) of Defendant Mid-Continent issued to Tulsa for the Project.

23. Defendant Mid-Continent has breached its duties and obligations to Plaintiff Flaherty & Collins by failing and refusing to indemnify Plaintiff for the losses it sustained as a result of the acts or omissions of its insured, Tulsa.

24. Defendant Mid-Continent's breaches of its duties and obligations to the Plaintiff Flaherty & Collins have damaged Plaintiff in the amount of Four Hundred Thirty-Seven Thousand Four Hundred Forty-Eight and 75/100 Dollars (\$437,448.75).

WHEREFORE, Plaintiff Flaherty & Collins Construction, Inc. requests this Court to enter Judgment for Plaintiff against Defendant Mid-Continent Insurance Company in the sum of Four Hundred Thirty-Seven Thousand Four Hundred Forty-Eight and 75/100 Dollars (\$437,448.75), together with interest and costs as allowable at law.

This the 15th day of October, 2010

POYNER SPRUILL LLP

By: s/ Thomas H. Davis, Jr.

Thomas H. Davis, Jr.

NC State Bar No. 7084

Post Office Box 1801

Raleigh, North Carolina 27602-1801

Telephone: (919) 783-6400

Facsimile: (919) 783-1075

E-mail: THDavis@poynerspruill.com

ATTORNEYS FOR PLAINTIFF,
FLAHERTY & COLLINS
CONSTRUCTION, INC.